312(c) and (d), 5 U.S.C. § 558(c), and (4) provide for finality, 47 U.S.C. § 402(j), 5 U.S.C. § 704.[23/]

B. The Very Limited Applicability of the Rule.

Even assuming Section 73.3539(c) is consistent with the Act, use of the early call up procedure is strictly limited. By its terms, the Rule can only be invoked when the Commission has determined to hold a hearing or make an investigation, or where a hearing already has been initiated or an investigation has been conducted. Even in such limited circumstances, the Rule by its terms only applies if the Commission finds that the filing of the application for renewal is "essential" to the hearing or investigation.

The restricted scope of the Rule has been substantially tightened by many Commission decisions. In repeatedly refusing to order early renewals, the Commission has stressed that it has always been "circumspect" in its discretionary use of the call up procedure, Sparks Broadcasting Co., 44 R.R. 2d 401, 402 (1978), and will do so only in "compelling circumstances."[24/] Any person

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23/ If, under Section 73.3539(c), a broadcast license term could be shortened, or a renewal compelled at any time at the sole discretion of the Commission, these statutory strictures would appear to be superfluous or nugatory. Since Congress cannot be presumed to do a useless or superfluous act in creating legislation, see Sutherland, Statutory Construction, § 45.12 (4th ed. 1984) (and cases cited therein), the correct interpretation to be accorded the cited statutory provisions would appear to be that Congress did not intend that a broadcast term could be shortened or a renewal compelled at any time in any manner other than those set forth in the statute, e.g., in Section 307(c).

24/ Sioux Empire Broadcasting Co., 9 F.C.C. 2d 683, 684, 10 R.R. 2d 1031, 1033 (1967). What the "compelling circum-

Footnote continued on following page.

seeking to persuade the Commission to invoke the Rule must demonstrate "'serious,' 'compelling reasons'" for doing so. Greater Portland Broadcasting Corp., 64 R.R. 2d 1264, 1266 (1988).

For the first 50 years of Section 73.3539(c)'s existence, the Commission never "set out pleading requirements for early [renewal] call up." Id. In Greater Portland, however, it held that a petitioner seeking to invoke the Rule must meet the standards of Section 309(d) of the Act, 47 U.S.C. § 309(d), that is, it must "allege a substantial and material question of fact, based on matters that the Commission can officially note or upon affidavits from persons with personal knowledge, that, if true, would be prima facie inconsistent with the public interest." Id.

C. Recent Commission Decisions Refusing to Invoke Section 73.3539(c).

The Commission's refusal, in 1986, in RKO General, Inc. (WOR-TV), 1 F.C.C. Rcd. 1081, 1085, 61 R.R. 2d 1069, 1082 (1986), to invoke Section 73.3539(c), aside from being a strong statement of the Rule's limits, is of particular significance here since the early renewal call up the Commission refused to grant was requested by counsel for Class, and this refusal is not noted in the Class Petition, even though the case is cited.[25/ 26/]

Footnote continued from preceding page.
stances" might be was not specified in Sioux Empire and in

The competing renewal applicant in the WOR-TV/New York case represented by Class' counsel, Mainstream, asked for an early renewal call up, basing its request primarily on the many instances of broadcast-related and other misconduct by RKO General revealed in WNAC-TV/Boston proceeding.[27/] The Commission refused to order early renewal, even under those circumstances, reminding Mainstream that the Commission will "not call for the early filing of a renewal application 'absent some compelling reason.'" Id. at 1085, quoting Sioux Empire Broadcasting Co., 9 F.C.C. 2d 683, 684, 10 R.R. 2d 1031, 1033 (1967). Focusing on the unproven allegations of misconduct by RKO General after the issuance of WOR-TV's license in March, 1983, the Commission said that "such unresolved issues" do not constitute "compelling circumstances." Id. at 1085.

In expressly rejecting Mainstream's reliance on New South Media Corp. v. FCC, 685 F.2d 708 (D.C. Cir.), a case primarily relied on here by Class,[28/] the Commission said that, like Class:

> Mainstream cites New South . . . for the general proposition that competing applications are viewed with favor under the law as a competitive spur to good licensee performance. That case ruled only that the Commission could not close a "renewal window" that would otherwise be open to applicants for the filing of construction permit applications for new stations to compete with renewal applications filed by RKO for all its stations other than

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26/ There can be no doubt, therefore, that the failure to cite this relevant decision was advertent.

27/ RKO General, Inc. (WNAC-TV), 78 F.C.C. 2d 1, 47 R.R. 2d 921 (1980).

28/ Class Pet. at 14-16.

KHJ-TV and WOR-TV. The court did not establish an open season for the filing of competing applications at any time during the station's license term.[29/]

The Commission also made clear that invocation of Section

conduct invoking the 1986 Character Qualifications Policy Statement,[31/] whether or not they were considered non-FCC misconduct. 64 R.R. 2d at 1265.

The Greater Portland decision is a strong rejection by the Commission of an early renewal call up request based on the 1986 Policy Statement. It is also not cited in the Class Petition. The Commission said in Greater Portland that the petitioner (like Class) had presented no new information. Id. It characterized application of Section 73.3539(c) as an "extraordinary, discretionary action" requiring "compelling reasons" which should, "at a minimum," be supported "with factual allegations meeting the requirements of Section 309(d)." Id. at 1266.[32/]

Last month, in a proceeding involving a dispute over site availability between mutually exclusive applicants for a new FM station in Bay Shore, New York, the Commission was urged to require one of the applicants to file an early renewal for its Patchogue, New York, AM station "in order to develop information relevant to the availability of the . . . [site]." Warren Price Communications, Inc., FCC 90-175, at para. 17, n. 14, released May 10, 1990. The Commission summarily refused, saying that it had all of the information it needed and that "there is no evidence

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31/ Policy Regarding Character Qualifications in Broadcasting Licensing, 102 F.C.C. 2d 1179, 59 R.R. 2d 801 (1986) (1986 Policy Statement).

32/ Citing Leflore Broadcasting Co., Inc., 36 F.C.C. 2d 101, 24 R.R. 2d 952 (1972), discussed, below, at 30-32. Petitions based on information and belief, or conclusory allegations, do not support Commission inquiry or actions affecting licenses. Capital Cities Communications, Inc., 58 F.C.C. 2d 373, 378, 36 R.R. 2d 757, 764 (1976).

that . . . [the AM licensee/FM applicant] has engaged in any conduct warranting an order directing it to file an early renewal application for . . . [its AM station]." Id.

D. Class' Petition Fails to Meet the Stringent Requirements for Application of Section 73.3539(c).

The Commission, both in the language of Section 73.3539(c) itself, and in its decisions interpreting the Rule, has established a number of criteria which must be met before the Rule will be applied. Class' Petition meets none of them.

1. Hearing or Investigation. The Commission has conducted neither a hearing nor an investigation[33/] with respect to

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33/ The Commission's authority to conduct investigations is found in Sections 4(i), 303(n), 308(b) and 403 of the Act. Of these, the principal investigative authority for the Commission is Section 403, which states:

> The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.

Investigations under this authority can be either public or private, formal or informal, and conducted by either the Commission itself or delegated to the staff. See, e.g., PTL of Heritage Village Church and Missionary Fellowship, Inc., 71 F.C.C. 2d 324, 45 R.R. 2d 639 (1979); Tidewater Radio Show, Inc., 75 F.C.C. 2d 670, 46 R.R. 2d 1411 (1980), Mountain City TV Co., 51 F.C.C. 2d 1167, 33 R.R. 2d 239 (Rev. Bd. 1975). And, when an investigation is conducted, a written report is required by Section 404 of the Act.

Investigations can be initiated by the Commission or as a result of information, petitions or complaints received by the Commission from outside sources. See Abuses of the Commission's Processes by Broadcast Applicants (Section 403 Inquiry re Dr. Bernard Boozer), 3 F.C.C. Rcd. 4740, 65 R.R. 2d 91 (1988).

Footnote continued on following page.

GAF Broadcasting's qualifications, and has not decided that a hearing or investigation is required. The rehash of the Guild's pleadings in Class' Petition provides no guidance for making such a decision.

2. "Essential." An early renewal application for WNCN would be irrelevant, not "essential," to the question of GAF Broadcasting's qualifications. Its only "contribution" would be to transform a ripe, decidable issue into a years-long, resource-draining, comparative renewal proceeding.

3. Needed Information. No facts relevant to the issue now before the Commission would be called for in a renewal application for WNCN,[34/] and neither Class nor its principals have any relevant facts to offer.[35/]

Footnote continued from preceding page.

The Guild's pending petition for reconsideration is, of course, not an investigation. It involves opposing "parties" (GAF Broadcasting and the Guild). There can be no "parties" in an investigatory inquiry. Radio Stations KISN, et al. - Section 403 Inquiry, 22 F.C.C. 2d 469, 470, 18 R.R. 2d 1025, 1027 (1970).

34/ See Warren Price Communications, Inc., FCC 90-175, released May 10, 1990.

35/ While not articulated in the cases, it is possible that, in some of its few decisions directing early renewal call ups, discussed below in subsection E of this Section, the Commission was motivated by the fact that the renewal application forms used at the time those decisions were made required the provision of substantial amounts of factual information which, the Commission could have believed, would be helpful to it in making its determinations.

4. "Compelling Circumstances." The "circumstances" on which Class' Petition is based arise from the single claimed incident of stock manipulation for which Mr. Sherwin and GAF were convicted. As GAF Broadcasting has shown in detail in its Supplement and in the other pleadings it has filed in response to the Guild, this single, isolated, aberrational event will not, under clear and long-standing Commission precedent, support a finding that GAF Broadcasting is unqualified. It is, therefore, not a "circumstance" which will support early renewal call up, much less a "compelling" one.

5. Personal Knowledge Support. Class' Petition is not supported by affidavits based on personal knowledge, or facts of which the Commission can take judicial notice (except the fact of the Sherwin/GAF conviction). It does not even present affidavits based on information and belief. Its assertions are conclusory, not factual.

6. Substantial and Material Question of Fact. Since it contains no facts known to Class, the Class Petition obviously cannot meet this requirement. There is, in any case, no material question of fact concerning GAF Broadcasting's qualifications. The central fact, that Mr. Sherwin and GAF were convicted, is uncontested.[36/] What remains is the legal issue already before

In summary, Class has filed a petition calling for early WNCN renewal call up based entirely on filings of the Guild in support of the Guild's allegations with respect to the GAF LBO transfer

licensee of WNCN. Class' Petition ignores all of the facts which are before the Commission in this regard. In particular, it ignores the 65-page Supplement filed by GAF on March 13, 1990, where the relevant facts and applicable law are spelled out in detail. Instead, contradictorily, it urges the Commission not to decide whether a hearing is required, id. at 14, but rather to order WNCN to file a renewal application now so that a comparative renewal hearing can evolve before, rather than after, the Commission decides the qualifications issue before it.

If the Commission decides that GAF Broadcasting is qualified before a renewal application is filed, Class will be free to file a competing application. Class' problem is not that it cannot wait eight months to file its proposed competing application. Its problem is to attempt to divert the Commission from deciding that GAF Broadcasting is qualified before then.[39/] Class' Petition is a paradigm of the wisdom of the Commission's circumspect policy of deciding whether a hearing is required before it decides whether to order an early renewal.

E. The Few Situations in Which Section 73.3539(c) Has Been Applied by the Commission Are Not Relevant Here.

During the past 52 years, the Commission has directed early renewal call up on only five occasions, none of which is applicable here.

39/ As Class' counsel explains it in his June 5, 1990 letter to the Commission, "Of course Class does not ultimately object to the suggestion . . . that the Commission 'delay no longer' in reviewing GBC's [GAF Broadcasting's] character qualifications." It only wants to be sure that this "occur[s] in the context of an early renewal proceeding," not before the WNCN renewal is filed, next February.

1. Efforts to Discourage Licensees From Raising the Carroll Issue.

After it was reversed by the court in the Carroll case in 1958,[40/] the Commission, obviously reluctant to become embroiled in making economic impact determinations as a part of deciding whether to authorize new stations, attempted to use the early renewal call up rule as a device to dampen the enthusiasm of existing licensees for exploiting the new Carroll Doctrine -- enthusiasm which proved to be substantial.[41/] In Herbert P. Michels, 17 R.R. 557 (1958), decided at the very time the Commission was considering whether to seek review of the Court's Carroll decision, id. at 559, n. 1, the Commission ruled that a licensee seeking to add a Carroll issue against a construction permit applicant must subject itself to early renewal call up and comparative consideration with the new applicant. Id. at 560. The Commission reasoned that, if the licensee was correct that the area would not support another station, a comparative hearing was

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40/ Carroll Broadcasting Company v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958).

41/ In the Carroll case, an existing radio licensee in Carrollton, Georgia, sought to block the grant of a construction permit for a new radio station in Bremen, Georgia, ten miles away. West Georgia Broadcasting Co. (Carroll), 14 R.R. 275 (1957). Licensee Carroll asked the Commission to consider whether the grant of a new station would so economically injure Carroll, because of the inability of the area to support an additional station, as to impair Carroll's ability to serve the public. The Commission refused, saying that such competitive impact determinations were beyond its statutory mandate. Id. at 284. The court, however, found that the Commission was wrong, holding that it "had the power to determine whether the economic effect of a second license in this area [of Georgia] would be to damage or destroy service to an extent inconsistent with the public interest." 258 F.2d at 443.

the way to determine which station should survive -- the licensee or the applicant.[42/] Michels, 17 R.R. at 560.

In unsuccessfully seeking reconsideration, the licensee in Michels branded the Commission's action a "punitive" measure by which the Commission was seeking to discourage a spate of economic protests which would be "monstrously inconvenient" to it. Id. at 560b. In a terse, two-sentence dissent, then Commissioner (and later Chairman) Hyde agreed, saying: "I would not use this kind of procedure as a sanction against the exercise of rights given by Congress." Id. at 560d.

Five years later, however, Commissioner Hyde's view prevailed. In 1963, without explanation, the Commission reversed its decision in Michels and held that "as a matter of policy, [it] will not advance the filing date of the renewal application of an existing station" which raises a Carroll issue against a new applicant. John Self, 45 F.C.C. 651, 653, 24 R.R. 1177, 1180 (1963). Two additional Commission Orders, released in the two months following the Self decision, reiterated this policy reversal. Bigbee Broadcasting Co., 25 R.R. 88 (1963); William L. Ross, 45 F.C.C. 757, 25 R.R. 360 (1963).[43/]

42/ At least in the Michels case, the Commission's strategy worked. Two weeks after their applications were designated for comparative hearing, the licensee and the applicant jointly requested that the proceeding be terminated. The Broadcast Bureau agreed and, a month later, so did the Commission, saying simply, "no purpose would be served by continuing the proceeding." Atom Broadcasting Corp., 17 R.R. 560d, 560e (1960).

43/ In Missouri-Illinois Broadcasting Co., 5 R.R. 2d 452 (1965), the Self decision was also followed, the Commission noting that the party losing on a Carroll issue can file a competing

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Despite the Commission's clear rejection of the Michels strategy, parties asserting Carroll issues continued to attempt to invoke the early call up rule, attempts which were sternly rejected by the Commission. See, e.g., Sioux Empire Broadcasting Co., 9 F.C.C. 2d 683, 684, 10 R.R. 2d 1031, 1033 (1967) (the Commission's "practice" is not to require the filing of an early renewal "absent some compelling reason"); Click Broadcasting Co., 17 F.C.C. 2d 375, 380, 16 R.R. 2d 1, 7 (1969) ("the Commission has always been circumspect in its discretionary use of the call up procedure").[44/]

After its one foray into attempting to circumscribe the Carroll Doctrine, the Commission never wavered in its refusal to employ the early renewal call up rule in Carroll issue cases.[45/]

Footnote continued from preceding page.
renewal application at the licensee's next renewal date. Id. at 454, 455. However, since the existing licensee's normal license period had expired, its renewal application was designated for hearing with a contingent comparative issue. Id. at 455.

44/ In Sparks Broadcasting Co., 44 R.R. 2d 401 (1978), the Commission had issued a notice of apparent liability against WHGR(AM) and WJGS(FM), unaware that the WJGS renewal had already been granted. Upon discovering this error, the ALJ suggested that the Commission might wish to consider an early call up. Citing Click, the Commission refused, even though two of the many allegations against the licensee involved false network affidavits and fraudulent billing, both potential bases for loss of license at the time. Order and Notice of Apparent Liability, FCC 77-815, paras. 3(a) and (b), released December 21, 1977. Of particular relevance to the situation presented here by the Class Petition, the Commission noted that an early call up might delay the proceeding by attracting a competing application. Id. at 402.

45/ Ultimately, of course, the Carroll Doctrine itself was repudiated by the Commission. Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 F.C.C. Rcd. 638, 641, 64 R.R. 2d 583, 589 (1988).

2. Apparent Burden Shifting Efforts by the Commission.

Under Section 312(d) of the Act, the Commission has both the burden of proceeding with the introduction of evidence and the burden of proof in a revocation hearing. In a renewal hearing, however, with or without competing applicants, both burdens fall on parties with respect to basic qualifications issues. Thus, the early renewal call up rule has presented a tempting avenue for the Commission, when it decides that a basic issue exists, to relieve itself of the burden of making its case. In two of the remaining four cases where the Commission invoked the Rule, it appears to have yielded to this temptation.

a. The Northern Corp., 12 F.C.C. 940, 4 R.R. 333 (1948). In 1948, the Commission had conducted an investigation, based on information in its files, of Northern Corp., the licensee of Boston radio station WMEX, and concluded that it appeared that the licensee had, over a period of years, submitted information about its stock ownership and refinancing which was of "doubtful accuracy." Id. at 940, 945. The Commission made a judgment that a hearing was required, id. at 942, and, on its own motion, ordered an early renewal filing. Id. at 940.

While the recitation of facts and law in the Northern Corp. decision is less than clear, it appears that Northern Corp. argued that the proper course for the Commission to follow, if it found evidence of misconduct, was to initiate a revocation proceeding, and asserted that the Commission was attempting to circumvent the burdens imposed on it by Section 312. Id. at 941. The Commission's only answer was that Section 312 is discretionary,

not mandatory, and that it had the flexibility to apply its own early call up rule. Id.

In Northern Corp., the Commission had made an investigation and determined to hold a hearing to consider alleged licensee misrepresentations before ordering early call up, as required by then Section 15.12 of its Rules. Here, neither of these events has occurred, and there have been no allegations of any kind with respect to GAF Broadcasting.

b. Leflore Broadcasting Co., Inc., 36 F.C.C. 2d 101, 24 R.R. 2d 953 (1972), aff'd. on other grounds, Leflore Broadcasting Co. v. FCC, 636 F.2d 454 (D.C. Cir. 1980). In Leflore, the last time the Commission followed an early call up procedure,[46/] it did so in connection with an AM radio station, WSWG, in a community in Greenwood, Mississippi, whose population was 50 percent black.

Leflore had purchased WSWG in August, 1969. In the assignment application, it had promised to broadcast a "primarily Negro, contemporary, and Rhythm and Blues" format. Id. at 102. In its

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46/ The Commission did not, in Leflore, cite its early renewal call up rule (then Section 1.539(c)). In subsequent decisions involving employment discrimination, the Commission has, citing Leflore, stated that one of the remedies available to it in connection with licensees with defective equal employment records is to order early renewal call up (although it has not made such an order). See, e.g., In re KOKI, 4 F.C.C. Rcd. 2067, 66 R.R. 2d 9 (1989); Pyle Communications, 2 F.C.C. Rcd. 1793, 62 R.R. 2d 935 (1987). These decisions, too, do not cite the rule. Whatever the reason for this omission may be, however, the Commission has, since 1972, consistently refused to order early renewal.

renewal application, granted less than a year after the assignment, Leflore promised to continue its black program "orientation." Id. Eight months later, however, the station's format was changed to country and western, and two months after that, it was changed again, this time to middle-of-the-road. Id.

The Commission received complaints concerning the operation of WSWG. They came from black former employees who had been fired, black community leaders, and a coalition of civil rights organizations, and asked, among other things, that the station's license be revoked. After conducting its own field investigation, the Commission determined that a hearing was required and directed that Leflore apply for its renewal early.

Leflore appears to be a burden shifting case, perhaps driven by the fact that the central issues against the licensee involved misrepresentation. That is, the Commission may have wanted the licensee to bear the burden of proving that it had told the truth (renewal hearing), rather than requiring the Commission to shoulder the burden of proving that the licensee had lied (revocation hearing). Because a central charge against WSWG was that it was failing to serve the predominantly black population of the Greenwood area, as it had promised to do, the Commission may have hoped that competing applications would be filed.

Whatever the Commission's motivations may have been, however, the facts in Leflore were that, in compliance with its early call up rule, the Commission had already conducted a field investigation and decided that a hearing was required to consider apparent station misconduct, before it ordered Leflore to file its renewal

early. In the case of WNCN, there has been no investigation or hearing determination, and there is no allegation of any misconduct by WNCN.[47/]

3. Other Early Renewal Call Ups.

The remaining two cases in which an early renewal was directed by the Commission, both from the 1950's, involved such unusual fact situations as to provide little illumination of the rule.

a. Narragansett Broadcasting Co., 7 R.R. 37 (1951).[48/] The Narragansett case was, in effect, a continuation of a comparative hearing. Three applicants competed for a new AM station in 1946. In 1947, a final grant was made to applicant Narragansett, based on its licensee qualifications. The station went on the air in 1948 and, in June, 1949, Narragansett, which had already had substantial owner changes, applied for transfer of control authority. One of the unsuccessful comparative applicants objected and, in October, 1949, the Commission, in an unpublished order, directed Narragansett to file an early renewal, saying that this was the appropriate course to follow in the unique circumstances "as a matter of policy" in view of the facts that (1) Narragansett

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47/ If, in Leflore, the Commission attempted to use early renewal as a device expeditiously to oust a licensee whose station was being operated contrary to the public interest, it did not work. It took nine years before the case was finally decided. And, of course, an early call up could result in a massive comparative hearing resulting in even greater delay, not expedition. See also Sparks Broadcasting Co., 44 R.R. 2d 401, 402 (1978). GAF Broadcasting, in contrast to Leflore, has operated its station in an exemplary manner for 14 years.

48/ An initial decision of Hearing Examiner Elizabeth Smith which was adopted by the Commission as its decision.

had received its authorization in a comparative proceeding, (2) it had been preferred on the basis of its integration qualifications (which either had been or would be eliminated by the proposed transfer of control), and (3) one of the unsuccessful applicants had reapplied.[49/] Narragansett Broadcasting Co., Order, FCC 49-1380, October 14, 1949. In the further comparative proceeding between Narragansett and the original competing applicant that had reapplied, begun in 1950, Narragansett prevailed again and its early filed renewal application was granted. 7 R.R. at 65.

b. Albuquerque Broadcasting Co. (KOB)., 25 F.C.C. 683, 16 R.R. 765 (1958), aff'd., American Broadcasting Co. v. FCC, 280 F.2d 631 (1960), was a part of the decades-long, 770 kc, clear channel saga which pitted KOB, Albuquerque, against the American Broadcasting Company's flagship radio station, WABC, New York. In this decision, one of many involving 770 kc, the Commission authorized KOB, and directed WABC, to operate with full power, but directionally, at night. So that the changes in the operations of the two stations could be made effective concurrently, WABC was directed to file its renewal application on the same date as New Mexico stations, that is, the date on which KOB would file. Id. at 792-93.

49/ It should be noted that the Avco Rule had been terminated only two and one-half weeks before Narragansett filed its transfer application. Under the Avco Rule, Powel Crosley Jr., 11 F.C.C. 1, 3 R.R. 6 (1945), competing applications for stations proposed to be assigned or transferred were comparatively considered. The Avco procedure has been prohibited since 1952 by present Section 310(d) of the Act.

[redacted]

convictions is set forth in the thousands of pages of hearing testimony of the three trials, all of which the Commission can officially notice. The Class Petition attempts to conjure up, without any support, other purported "fact" questions. The fruits of these efforts are without merit.

1. A Wall Street Journal article, cited by the Guild, furnished to the Commission by GAF Broadcasting, and attached to Class' Petition as a part of its Attachment 10, reported that, in the second GAF trial, which ended in a hung jury after 12 days of deliberations, "the judge instructed the jury to consider the executive [Mr. Heyman] as an unindicted co-conspirator so any testimony concerning Mr. Heyman could be considered in the jury's deliberations." The Class Petition says that GAF concedes that "the government viewed Heyman as an unindicted co-conspirator in the criminal misconduct." Class Pet. at 5. GAF concedes no such thing.[52/] In any respect, the matter is irrelevant since Mr. Heyman was not indicted (or, for that matter, named by the grand jury as an unindicted co-conspirator). Class would have the Commission conduct a criminal trial to determine why Mr. Heyman

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52/ In its Opposition to filings made by the Guild, attached to Class' Petition as Attachment 10, GAF Broadcasting pointed out, at 3, n. 2, that, "In point of fact, the newspaper account inaccurately characterized the court's charge, which stated only that if the jury found any others, including Mr. Heyman, to be co-conspirators, it could consider, for evidentiary purposes, testimony concerning their out-of-court statements against the defendants." Neither the Journal reporter, nor Class, nor anyone else has any way of knowing whether the jury in any of the three trials even considered the issue, let alone made any such finding, as a part of their deliberations.

was not indicted, id. at 9, something the Commission cannot and will not do.[53/]

2. On July 26, 1988, two and one-half weeks after Mr. Sherwin and GAF were indicted, GAF Broadcasting reported the indictment to the Commission in an amendment to the then-pending LBO transfer of control application. The amendment was signed by Mr. Heyman. In it, he expressed his confidence that Mr. Sherwin and GAF would be completely vindicated. Class' Petition urges that, since a conviction of Mr. Sherwin was eventually obtained eighteen months later, a hearing is required to determine whether Mr. Heyman dissembled when he expressed confidence. Class Pet. at 7. That it took three trials to convict Mr. Sherwin and GAF, and that, according to press accounts, a majority of the jurors at the second trial (which ended in a hung jury) did not favor conviction,[54/] are facts ignored by Class.

3. Finally, Class asserts, without any support, that, even if Mr. Heyman was confident on July 26, 1988, there must have come a time when his confidence was shaken, at which point GAF Broadcasting had an obligation, under Section 1.65 of the Commission's Rules, to report this changed confidence circumstance. Class Pet. at 7. To support such "logic," the change in confidence necessarily must have occurred before conviction,

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53/ See, e.g., the review of Commission practice in Alan K. Levin, 97 F.C.C. 2d 1, 55 R.R. 2d 981 (Rev. Bd. 1984). Perplexingly, Class does not request that a hearing issue also be designated to inquire into when Mr. Heyman stopped beating his wife.

54/ See GAF Broadcasting, "Supplement" at 12-16, filed March 13, 1990.

because GAF promptly amended its application to report the conviction. A hearing is required, Class' Petition asserts, to pinpoint GAF's confidence sag. Here, Class ignores the fact that Mr. Sherwin and GAF are vigorously appealing the conviction in the third trial.

Fairly read, the questions of "fact" the Class Petition purports to identify confirm that no material question of fact exists.[55/]

VII. IN REJECTING THE CLASS PETITION, THE COMMISSION SHOULD EXPRESSLY CLOSE A POTENTIAL LOOPHOLE IN ITS SETTLEMENT RULES

In 1988, the Commission proposed to limit settlements of comparative renewal proceedings in order to eliminate abuses of the renewal process. The Commission found "the existing renewal process has provided or can provide a vehicle to extort licensees," and that existing rules "may not be adequate to deter parties from filing a license application for the purpose of receiving consideration from the renewal applicant in return for withdrawing a renewal challenge." Second Further Notice of Inquiry and Notice of Proposed Rulemaking, BC Docket No. 81-742, 3 FCC Rcd. 5179, 5181-82 (1988).

In 1989, the Commission concluded that tough new rules were necessary. First Report and Order, BC Docket No. 81-742, 4

55/ The contention in Class' Petition at pp. 11-12, that two civil decisions against GAF, years ago, involving roofing materials, which were disclosed by GAF Broadcasting in its 1988 transfer of control application, require a hearing does not warrant discussion. The facts were fully presented by GAF Broadcasting and Class' contention was expressly rejected by the Staff.

F.C.C. Rcd. 4780, 66 R.R. 2d. 708 (1989). It found that its concerns about abuse were warranted, that its existing rules created "the clear potential for abuse of our license renewal process," and that new rules were necessary to "eliminate those applicants whose purpose in filing is to settle out for profit."[56/] Id. at 4782-83. The Commission thus adopted new rules prohibiting all payoffs for dismissal of competing applications prior to an initial decision, limited payments afterward to legitimate and prudent expenses, and prohibiting all payoffs to petitioners to deny in excess of the petitioner's legitimate and prudent expenses. Sections 73.3523 and 73.3524. These strong measures have recently been reaffirmed on reconsideration.[57/] News Release, "FCC Declines to Reexamine Decisions Concerning Abuse of the Comparative Renewal Process," May 11, 1990.

Class' Petition may pose a loophole to these important new rules. Petitions to call up a station license for early renewal are not expressly subject to the settlement payment proscriptions.[58/] Stations could thus face the threat of a competing

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56/ The Commission noted that two competing applicants in license renewal proceedings "filed the only comments that oppose monetary limits on settlement agreements on policy grounds." Id. at 4781. Those applicants were represented, and their filings were made, by Class' counsel.

57/ Congress, too, recognized the potential for abuse of the comparative renewal process when, in 1981, it added Section 311(d) to the Act, to prevent the filing of "frivolous" renewal challenges by parties who then offer to withdraw in exchange for a payoffs. H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 898 (1981).

58/ There is also a question as to whether the settlement of a court appeal of denial of an early call up petition would be encompassed by the new rules.

WOOK-FM, Washington, D.C. ($1,275,000). More than $24 million in comparative renewal settlements has been garnered by Class' counsel.[60/] An abuse of process issue has been added against another comparative renewal applicant represented by them, to determine whether the application was filed to procure a settlement.[61/]

60/ WWOR-TV, Inc., FCC 88M-3567, released October 25, 1988